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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LARRY ISMAEL CAMPOS, JR., Defendant and Appellant.	B292197 (Los Angeles County Super. Ct. No. KA051636)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

Larry Campos appeals from the trial court's order denying his petition to recall his sentence for possession of a firearm by a felon and resentence him under the provisions of Proposition 36, the Three Strikes Reform Act. The trial court found Campos ineligible for resentencing because he was armed with a firearm during the commission of the offense for which he had been sentenced. On appeal, Campos argues that interpreting Proposition 36 to exclude inmates convicted of possession of a firearm by a felon from resentencing is contrary to the proposition's language and the voters' intent.

Numerous courts have rejected the arguments raised by Campos and either affirmed denials or reversed grants of relief under Proposition 36 to inmates sentenced for possession of a firearm by a felon. We join them and affirm the order.

FACTUAL BACKGROUND

A detective with the Azusa Police Department followed Campos's pickup truck after receiving a tip that Campos, a parolee, was carrying a handgun. The detective activated the lights and siren on his vehicle and Campos fled, ultimately crashing into a van. Campos then ran away on foot, dropping a handgun as he did so. A police officer recovered the handgun while other officers caught and detained Campos. Campos had a baggie of bullets in his pants pocket and a single bullet in his shirt pocket.

PROCEDURE

Campos was convicted of possession of a firearm by a felon (Pen. Code,[1] former § 12021, subd. (a)(1)). Allegations that he suffered two prior convictions for robbery and served a prior prison term were found true, and thus his sentence was subject to enhancements under the Three Strikes law (§§ 667, subds. (b)–(j), 1170.12) and section 667.5, subdivision (b).[2] On December 21, 2001, the trial court sentenced Campos to 26 years to life.

Eleven years later Campos petitioned the trial court to recall his sentence and hold a new sentencing hearing pursuant to section 1170.126, enacted as part of Proposition 36. The trial court denied the petition, finding Campos statutorily ineligible because "during the commission of the current offense" he "was armed with a firearm."

Campos timely appealed.

STANDARD OF REVIEW

Campos challenges the trial court's interpretation of Proposition 36, and thus presents issues of statutory construction. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1276 ["In interpreting a voter initiative such as [a proposition], we apply the same principles that govern the construction of a statute"].) Our review is de novo. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.)

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[1] Undesignated statutory citations are to the Penal Code. The prohibition against possession of a firearm by a felon is now codified in section 29800.

[2] Campos also was convicted of a misdemeanor violation of the Vehicle Code that is not at issue in this appeal.

DISCUSSION

Prior to the enactment of Proposition 36, a defendant previously convicted of two serious or violent felonies ("strikes") who was convicted of a new felony would be subject to an indeterminate life sentence. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Proposition 36 amended the law "by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender." (*Id.* at pp. 167–168; see §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Proposition 36 also provided that an inmate serving a third-strike sentence for a nonserious and nonviolent felony could petition for a reduction in his or her sentence. (§ 1170.126, subds. (b), (e).)

An inmate is statutorily ineligible for a sentence reduction, however, if the current offense is one of several specified controlled substance or sex offenses. (§§ 667, subd. (e)(2)(C)(ii), 1170.12, subd. (c)(2)(C)(ii), 1170.126, subd. (e)(2).) An inmate is also statutorily ineligible if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) Finally, an inmate is statutorily ineligible if he or she has suffered a prior conviction for certain enumerated felonies. (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv), 1170.126, subd. (e)(3).)

Here, the trial court found Campos statutorily ineligible for a sentence reduction under section 667(e)(2)(C)(iii), because during the commission of his third-strike offense for possession

of a firearm by a felon, Campos "was armed with a firearm." " 'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*), disapproved on another ground by *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8.)

Campos does not dispute that at the time he committed his third-strike offense he had a firearm available for use. Campos maintains, however, that to be statutorily ineligible under Proposition 36, the defendant must have the firearm "available for use in furtherance of the commission of the offense that is the subject of the recall petition." (Italics omitted.) "This," Campos contends, "requires that the arming and the offense be separate, but 'tethered,' such that the availability of the weapon facilitates the commission of the offense." (See *Osuna*, *supra*, 225 Cal.App.4th at p. 1032 ["Having a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon."].)

In support, Campos cites *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), in which our Supreme Court interpreted the phrase " 'armed with a firearm in the commission' " of a felony to require a " 'facilitative nexus' " in the context of the sentencing enhancement under section 12022. (*Bland*, at p. 1002.) In other words, a defendant is " 'armed with a firearm in the commission' " of an offense only if the firearm is "available for use in furtherance" of the offense. (*Ibid.*) Because in this case being armed with a firearm "satisfies an essential element of the offense" of possession of a firearm by a felon, and does not facilitate a separate offense, Campos argues the trial court erred in finding him ineligible for sentence reduction.

As Campos concedes, numerous appellate courts have rejected the argument that Proposition 36 requires a facilitative nexus between the firearm and the current offense, and thus have held that defendants with third-strike convictions for firearm possession are ineligible for sentence reduction under Proposition 36. (See, e.g., *Osuna*, *supra*, 225 Cal.App.4th at pp. 1030–1032; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797–799 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 283–284 (*Hicks*).) These cases note the distinction between an enhancement provision like section 12022, which adds "an additional term of imprisonment . . . for which a defendant cannot be punished until and unless convicted of a related substantive offense," and Proposition 36, which does not impose additional punishment but reduces existing punishment. (*Osuna,* at pp. 1030, 1032; see also *Brimmer*, at p. 799; *Hicks*, at pp. 283–284.) Thus, the prohibition against applying an arming enhancement to an offense of which arming is " 'an integral part' " (see *People v. Elder* (2014) 227 Cal.App.4th 1308, 1313 (*Elder*), italics omitted), does not apply in the context of Proposition 36, which reduces rather than enhances punishment.

The cases further note that the arming enhancement in section 12022 applies when a defendant is armed with a firearm "*in* the commission" of the offense, whereas Proposition 36 deems a sentence ineligible for reduction if the inmate was armed with a firearm "*[d]uring* the commission" of the offense. (Italics added.) (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 798–799; *Hicks*, *supra*, 231 Cal.App.4th at pp. 283–284; see §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Because " '[d]uring' is variously defined as 'throughout the continuance or course of' or 'at some point in the

course of,' " the courts have concluded Proposition 36 "requires [only] a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna*, at p. 1032; see also *Brimmer*, at pp. 798–799; *Hicks*, at p. 284.)

Campos argues these cases fail to explain why the phrase "during the commission" is substantively different from the phrase "in the commission." Campos contends the phrases are grammatically interchangeable, and there is no reason to assume the term "during" cannot also include a facilitative element. The Supreme Court itself made clear the difference between "in" and "during" in *Bland*, stating that "by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense." (*Bland*, *supra*, 10 Cal.4th at p. 1002.) In other words, the phrase "in the commission" contains *both* a temporal nexus *and* a facilitative one, and the Supreme Court used the term "during" to denote the temporal nexus only. (See *Osuna*, *supra*, 225 Cal.App.4th at p. 1032 [quoting *Bland* for the proposition that " ' "in the commission" of ' requires both that ' "arming" ' occur during underlying crime *and* that it have facilitative nexus to offense"].)

Campos argues that in other contexts, such as the enhancement under section 12022.7 for infliction of great bodily injury, the phrase "in the commission of a felony" requires only a temporal relationship, not a facilitative one. Campos contends this indicates that the choice between "in" and "during" "is not a sound basis for distinction between temporal and facilitative."

The cases cited by Campos discussing section 12022.7 do not address the distinction between temporal and facilitative nexus, and thus do not shed light on the issue before us. (See *People v. Poroj* (2010) 190 Cal.App.4th 165, 168 [section 12022.7, subdivision (a) does not impose an intent requirement beyond the intent required to commit the underlying felony]; *People v. Valdez* (2010) 189 Cal.App.4th 82, 84 [section 12022.7 enhancement does not apply to conviction for fleeing the scene of an injury accident when injuries were caused by the non-felonious accident, not the fleeing]). Regardless, as we have discussed, the Supreme Court's analysis in *Bland* makes clear that for purposes of Penal Code provisions based on defendants arming themselves with firearms, there is a distinction between "in" and "during." (*Bland*, *supra*, 10 Cal.4th at p. 1002.)

Campos argues that had voters intended to make firearm possession crimes ineligible for sentence reduction, they would have included them in the list of specific ineligible offenses rather than using language "that had previously been construed to also require a facilitative nexus." As we have explained, Campos is incorrect that the phrase "during the commission" has been construed to require a facilitative nexus, and indeed *Bland* compels the opposite conclusion. Thus, to the extent Campos is suggesting the voters' intent in using that phrase is ambiguous, we must disagree. (See *People v. Weidert* (1985) 39 Cal.3d 836, 845–846 ["Where the language of a statute uses terms that have been judicially construed, ' "the presumption is almost irresistible" ' that the terms have been used ' "in the precise and technical sense which had been placed upon them by the courts." ' "].)

We further conclude that it was *not* the voters' intent to exclude categorically all firearm possession offenses from relief under Proposition 36, which is further explanation for why those crimes are not listed among the enumerated ineligible offenses. The Penal Code's provision prohibiting possession of firearms by felons applies not only to felons who have actual possession of a firearm, but more broadly to any felon "who owns, purchases, receives, or has in possession or under custody or control any firearm." (§ 29800, subd. (a)(1).) Thus, a defendant may be convicted under this provision based on *constructive* possession, that is, when the defendant does not have immediate possession or control of the weapon, but the weapon " 'is nonetheless under his dominion and control, either directly or through others.' " (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029.) For example, a felon who purchased a firearm, but had not yet taken physical possession of it, would be in violation of the statute without ever being armed with a firearm. (See *Osuna*, at p. 1030 ["possessing a firearm does not necessarily constitute being armed with a firearm"].) We may assume the voters recognized this, and limited the ineligibility of firearm possession crimes under Proposition 36 only to those in which the defendant posed a danger by having actual possession of a firearm. (See *Elder*, *supra*, 227 Cal.App.4th at p. 1314 [among electorate's concerns in enacting Proposition 36 was "making sure that *dangerous* felons did not benefit from any of the amendments and remained sequestered"].)

Campos disputes that felons in possession of firearms are the sort of dangerous criminal voters intended to exclude from the benefits of Proposition 36. Campos argues that "having a weapon readily available for use generally does not render a

person truly dangerous" and "is something that people do lawfully every[ ]day." Campos contends that "[a]vailability of a weapon only becomes dangerous when it might facilitate a crime."

The court in *Elder* rejected this argument: "While, as defendant asserts, possession of a gun of itself is not criminal, a *felon's* possession of a gun is not a crime that is merely *malum prohibitum*. As we stated nearly 20 years ago, 'public policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.' [Citation.] Therefore, even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters' intent." (*Elder*, *supra*, 227 Cal.App.4th at p. 1314.) We agree, and similarly conclude that interpreting sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii) to render firearm possession crimes ineligible for relief, at least insofar as when the offender is in actual possession of the weapon, is consistent with the voters' intent.

DISPOSITION

The order denying the petition for recall and resentencing is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.